

***United States Court of Appeals
for the Second Circuit***



**APPELLANT BRIEF
ON REHEARING
EN BANC**

77-1243

In The
United States Court of Appeals
For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

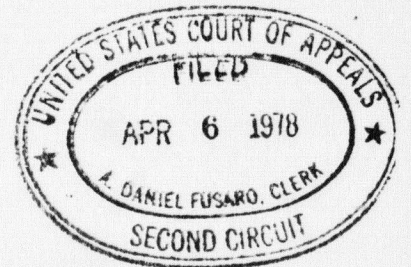
-against-

WILLIAM HOCKRIDGE, CHARLES PETRI and STEPHEN
EASTON,

Defendants-Appellants.

PETITION FOR REHEARING EN BANC

DANIEL J. KORNSTEIN
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April 10, 1978

Clerk of the Court
United States Court of Appeals
United States Courthouse
Foley Square
New York, New York 10007

Re: USA v. Petri
Docket No. 77-1243

Dear Sir:

I am writing this letter to correct a typographical error in the Petition for Rehearing En Banc filed on April 6 on behalf of appellant Petri. The first line of text on page 3 of the Petition should read: "On this appeal we are not dealing with..." rather than "On this appeal we are dealing with...." The word "not" should be inserted between the words "are" and "dealing."

Very truly yours,


Daniel J. Kornstein

DJK:pk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
UNITED STATES OF AMERICA, :
Appellee, : DOCKET NO. 77-1243
-against- :
WILLIAM HOCKRIDGE, CHARLES PETRI :
and STEPHEN EASTON, :
Defendants-Appellants. :
-----X

PETITION FOR REHEARING EN BANC

Appellant Petri hereby petitions this Court pursuant to Fed.R.App.P. 40 for rehearing en banc. On March 27, 1978, this Court affirmed the judgments of conviction in this case.

The principal issue raised on this appeal was whether appellants were denied their right to a unanimous verdict based on proof beyond a reasonable doubt because the district court failed to set aside the partial verdict on the conspiracy count, after hearing--before the jury was discharged--two jurors say that the reported verdict on the conspiracy count was not their true verdict. In short, the issue was whether impeachment of a partial verdict prior to

jury discharge is governed by lesser standards than impeachment of an entire verdict after jury discharge.

Though admitting this was a "difficult and novel situation," Slip Opinion at 2147, this Court held that a duly recorded partial verdict is as final as a complete verdict after jury discharge.

Appellant Petri believes this panel of this Court erred.

Timing of the Repudiation. This Court conceded that, "Neither the cases nor the treatises definitively answer the question whether Rule 606(b) [of the Federal Rules of Evidence] bars the impeachment of a partial verdict by the voluntary and spontaneous testimony of a juror prior to the jury's discharge." Slip Opinion at 2142. But this Court scanted the very language of Rule 606(b) itself and the fair implications of the authorities.

Inasmuch as the repudiation occurred prior to discharge, Fed.R.Evid. 606(b) is for the most part irrelevant here. Rule 606(b) provides:

Inquiry into validity of verdict or indictment.—Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to

or dissent from the verdict or indictment or concerning his mental processes in connection herewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about what (which) he would be precluded from testifying be received for these purposes.

On this appeal we are dealing with the competency of jurors as witnesses; no one--other than the trial judge during deliberations--spoke to or interviewed the jurors, so far as we know. On its face, then, Rule 606(b) does not, by its terms, bar repudiation of the verdict here.

Moreover, although it is true that no court or commentator has explicitly discussed "the relationship between Rule 606(b) and partial verdicts after which a jury continues its deliberations," Slip Opinion at 2144, the fair implication from the discussions that exist is consistent with permitting repudiation prior to jury discharge. Discharge and nothing else is the crucial divide. In the leading treatise on the law of evidence, Dean Wigmore, after stating the general rule that jurors' motives, beliefs, misunderstandings, intentions and the like are immaterial, points out:

The reasons for the foregoing rule, namely, the dangers of uncertainty and of tampering with the jurors to procure testimony, disappear in large part if such investigation as may be desired is

made by the judge and take place before
the jurors' discharge and separation.

8 J. Wigmore, Evidence §2350, at 691 (McNaughton rev. 1961) (emphasis in original). See also 3 Weinstein's Evidence §606(04) (1975); 6A Moore's Federal Practice §59.08(4) at 59-143; ABA Standards Relating to Trial by Jury, Commentary to §5.7 at 137 (Approved Draft 1968). Precisely such investigation was made here by the judge prior to discharge, yet the trial judge took no effective remedial action.

Partial Verdicts As Tentative, Working Hypotheses. This Court has ignored the function of partial verdicts as tentative working hypotheses. It has exalted the interest in verdict finality to a position where it impinges on the jury process itself, and has turned inside out the interests in freedom of jury deliberation.

Partial verdicts, if they are to be allowed at all, must be considered in the nature of tentative, working hypotheses subject to change prior to the jury's discharge. This rule is the only way to take account of decision-making problems by a jury. Any other rule may well freeze a jury prematurely into a partial verdict that the subsequent course of deliberations reveals as unwise, particularly where, as here, there is an interdependence between the first court and the

subsequent courts. Thus a partial verdict, like the one here, should be likened to only an early estimate of guilt or innocence, an estimate probably made by any jury:

In deciding a disputed proposition, a rational factfinder probably begins with some initial, a priori estimate of the likelihood of the proposition's truth, then updates his prior estimate in light of discoverable evidence bearing on that proposition, and arrives finally at a modified assessment of the proposition's likely truth in light of whatever evidence he has considered. When many items of evidence are involved, each has the effect of adjusting, in greater or lesser degree, the factfinder's evaluation of the probability that the proposition before him is true.

Tribe, "Trial by Mathematics: Precision and Ritual in the Legal Process," 84 Harv. L. Rev. 1329 (1971). It makes common sense and is in accord with experience that tentative, working hypotheses, particularly in deliberative decision-making groups, often undergo change as more investigation, more light and more discussion take place.

For example, surely the members of this Court are aware of cases where they or other judges have formed initial positions following oral argument only to change their positions after more reflection or after reading draft opinions for the majority and the dissent. The tentative decision made by appellate judges in conference following oral argument resembles a partial verdict, and that decision is subject to

change prior to when the formal written decision is actually published. The same reality applies to jury verdicts. If partial verdicts are permissible, they must be regarded only as assumptions adopted to permit or facilitate further deliberations, assumptions that are not immutable until the jury is discharged. Thus frank recognition of the deliberative jury process would support allowing a partial verdict to be impeached prior to discharge.

At oral argument, the panel asked what counsel would do if a partial verdict of acquittal were later repudiated before discharge in favor of conviction. As a matter of logic, symmetry, and fairness, counsel would have to abide by that later verdict. The Double Jeopardy Clause is not implicated.

Conclusion

For the reasons given, appellant Petri requests that this Court grant a rehearing en banc.

Respectfully submitted,

DANIEL J. KORNSTEIN
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New York, New York 10036
(212) 354-5992

COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

- against -

WILLIAM HOCKRIDGE CHARLES PETRI &
STEPHEN BASTON,
Defendants-Appellants,

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF

ss.:

I, Reuben A. Shearer, being duly sworn, depose and say that deponent is not a party to the action.
is over 18 years of age and resides 211 West 144th Street; New York, New York

That on the 6th day of April, 1978 at 1 St Andrews Plaza
New York, New York

deponent served the annexed

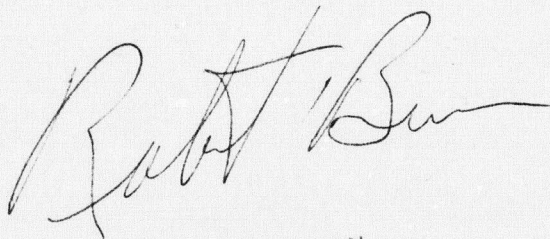
upon

Petition~~ex~~

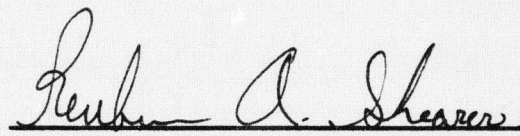
U.S. Atty-Southern Dist
Robert B Fiske, Jr.

the in this action by delivering³a true copy thereof to said individual
personally. Deponent knew the person so served to be the person mentioned and described in said
papers as the herein,

Sworn to before me, this 6th
day of April, 1978



ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1979



Reuben A. Shearer